No. 2814

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EASTERN OREGON LAND COMPANY
a Corporation
APPELLANT

vs.

DES CHUTES RAILROAD COMPANY
a Corporation
APPELLEE

DES CHUTES RAILROAD COMPANY
a Corporation
CROSS-APPELLANT

vs.

EASTERN OREGON LAND COMPANY
a Corporation
CROSS-APPELLEE

Supplemental Brief of Appellee and Cross-Appellant DesChutes Railroad Company

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EASTERN OREGON LAND COMPANY,
a corporation,
Appellant,

v.

DES CHUTES RAILROAD COMPANY,
a corporation,
Appellee.

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a corporation,
Cross-Appellant,

v.

EASTERN OREGON LAND COMPANY,
a corporation,
Cross-Appellee.

Supplemental Brief of Appellee and Cross-Appellant

DesChutes Railroad Company

ARGUMENT

Appellant has filed what purports to be a reply brief herein. The matter, however, contained on pages 1 to 14, inclusive, in case appellant intended to make any use thereof, should in our opinion have been included in its opening brief. Appellee was not

given an opportunity to answer the same and we are therefore filing a short statement in answer thereto.

This matter is another illustration of the shifting by appellant from one position to another.

The position is now taken in the brief and was stated by Mr. Veazie in his closing oral argument, that the main object of the appellant is to preserve its right to construct a dam and develop the water power in the Des Chutes River at the dam site in question and that the decree fails to do this. An examination of the decree (Trans. p. 126, *et seq.*) will disclose that the appellant's counsel are mistaken in this. The decree adjudges the rights of the parties in the three different classes of lands involved. After defining the rights in the property title to which was in the Government at the time of the commencement of this suit, the decree states: "Provided, however, that the right hereby decreed to defendant shall not be understood or considered to interfere with or deprive complainant or its successors in interest of the right to construct and maintain a dam for hydraulic purposes in the Des Chutes River where it passes through such property, and installing in connection therewith appliances for the purpose of developing hydraulic and electric power for all purposes, provided the track or roadbed of defendant shall not thereby be flooded or damaged or the operation of its road interfered with."

A similar provision is contained in said decree after that part of the decree defining the rights in

the property acquired from the Interior Development Company, and over that property title to which was admitted to be in the Sherar heirs prior to the commencement of the suit and acquired by the complainant from the Sherar heirs, the Court gives the defendant a right of way upon the payment of $1,000 and enjoins the complainant from interfering with the line of the Railroad Company "except as permitted by this decree," thus preserving to the complainant the right to construct its works in the manner as defined in the former part of the decree.

From the start of this case the Railroad Company conceded that its line is high enough for the purpose of permitting the construction of a dam and power development, in fact, that it is high enough to permit the construction of a 60-foot dam, provided proper means are taken to take care of the flood water. As a matter of fact, the line was raised to this elevation for this very purpose, and defendant supposed that it was entirely satisfactory to all concerned. Had the present contention of the appellant been its true contention at the time of the commencement of this suit, this case would never have been commenced. The Railroad Company was at all times ready and willing to meet the Land Company more than half way to enable both to work out their respective constructions to their best mutual advantage, but the Land Company, after the grade of the railroad was completed, stepped in and asserted that the Railroad Company had no rights whatever at the location and insisted upon its full pound of

flesh. The lower court in its decree permitted the Land Company to take its full pound of flesh as it insisted, but refused to permit it to take any blood.

In order to secure the decree appellant is now contending for it must rely upon something more than its mere legal right. It must have some contract right.

Having insisted upon its full legal rights and having maintained that there was no contract, it certainly should be satisfied with a decree which fully protects its legal rights and should not now be heard to object. The decree gives to the Land Company the utmost it was entitled to in the matter of preserving its right to construct a dam and develop the water power.

As respects the Land Company itself, its testimony is positive that it had no contract with the Railroad Company and that it purchased the land after it had ascertained from its predecessors in interest that none of them had. Mr. Martin, the president of the Land Company, testified (Trans. p. 205):

"I ascertained that the people from whom we were buying the property had not in any way involved the property in any *promises or agreements or deeds or any act at all which involved the question of right of way.* What remained to be settled after we bought was the question of whether the railroad had ever had any right to come on there at all or not." This testimony was given by Mr. Martin at the time of the trial after the complaint had

been finally amended to allege that the Land Company had purchased the property on the faith and knowledge of the alleged agreements of the predecessors in interest of the Land Company with the Railroad Company by which the Railroad Company had agreed to construct at such elevation as to permit of the construction of a 60-foot dam.

Had the court found that any contract rights existed, it would have had to find this testimony of Mr. Martin to be untrue. The court therefore refused to find that any such contract rights existed and proceeded to find what the legal rights of the parties were, as if no such contracts existed, and in view of this testimony of Mr. Martin that was exactly what the Land Company desired, and it certainly should not now be heard to object to the action of the lower court in this regard. Without any contract rights the right of the owner of the Sherar property was limited to the raising of the water 28 feet at the dam site, because any additional height would flow the water back upon land not owned by the Land Company and which was in fact owned by the Railroad Company. This limitation also applies to the predecessors of the Land Company in the ownership of the Sherar property. Laughlin, the owner of the option to purchase under which the Land Company acquired the Sherar lands, positively denied any agreement with the Railroad Company for any height of dam, but strenuously asserted that the Railroad Company was to go up to such height as it could to preserve the power possi-

bilities and to pay for any damage it did to the power development of the property.

Anything over 28 feet at the dam site would give the property the full limit of its power development and therefore would damage the power development of the property in no way. Similarly with regard to the Sherar heirs. The permit from them is contained in the letter from Huntington to Morrow of August 25, 1909, (Trans. p. 175) and is "provided that the road is constructed sufficiently above the river as that it will not interfere with the use of the property for hydraulic purposes." Likewise here any height over 28 feet did not interfere with the property for hydraulic purposes, for that was the limit to which the water could be raised without the use of the property not owned by the Sherars, and in fact owned by the Railroad Company itself.

If the Land Company had any rights to build above 28 feet it acquired such rights from the Interior Development Company, for Mr. Welch, the president of that company, testified that with the maps and profiles of the Railroad Company and the Development Company before them, it was decided that if the Railroad Company built on the line shown by its maps and profiles, that would permit the construction of a dam 60 feet high by making provision in the dam to take care of the flood waters, and if the Railroad Company constructed at that height, it could have its right of way free over the lands of the Development Company. There was nothing in this arrangement with the Development

Company that the railroad should protect its banks and fills. All it was required to do was to construct at the elevation at which it did. The lower court did find that this arrangement existed as far as the Development Company was concerned and that the Railroad Company had thus earned its right of way across the lands of that company. The only obligation, therefore, on the Railroad Company was to raise its grade to a height to protect the power development of the Sherar property, which was 28 feet, and as far as the Development Company was concerned, to construct where the line is now constructed. The Development Company was apparently satisfied that it could construct in such a manner as not to damage or injure the Railroad Company, and, in fact, all the engineers seem to agree that this can be done. As far as the control of the height of the water is concerned, this can be done by proper construction of the dam; as far as the fills of the roadbed are concerned, by riprapping, which can be done at little expense. We might suggest that if the force of men which has been maintained there for a number of years working aimlessly, throwing rocks into the river under the colorable pretense of constructing a dam for the purpose of preserving the water appropriation and preventing it lapsing, and in which Mr. Martin testified they had expended $14,000, had been put to work riprapping, they could have served some useful purpose and accomplished all the riprapping necessary to preserve the entire roadbed from damage.

But the Land Company is now attempting to engraft an additional obligation upon the railroad not required under the agreement with the Development Company and certainly not required under the legal rights of the parties as to the Sherar property at any height above 28 feet or on any property not acquired from the Sherars. The demands of the Land Company now made seem to contemplate that the Railroad Company shall riprap or protect its roadbed on its own lands above the lands owned by the Sherars and on which to this day no flowage rights have been acquired. The Land Company assumes not only that it has the rights to flow this right of way, but in addition that the Railroad Company shall be required to riprap and protect it, whereas the very most which it has any right to demand is that the railroad should protect its roadbed on the lands of the Sherars to a height of 28 feet. But even this it has no right to demand, for it offered no proof as to what this would amount to, and the amount of damages awarded by the court in the absence of any proof covers all damage to the Land Company, and if any such damage as that now referred to was contemplated, it had its opportunity to present testimony thereon and cannot complain because it failed to do so. As to the Development Company, no such requirement was imposed on the Railroad Company and the Development Company agreement was fully complied with.

It should also be considered that the Railroad Company spent over $100,000 more in construction

of its road at the elevation at which it was constructed, than it would have been required to spend if constructed at the elevation at which it was originally surveyed. This fact was known to the owners of the land at this dam site and undoubtedly considered a sufficient consideration to get the railroad to go up to this elevation with the power developers to protect the roadbed when they got ready to make their development.

The decree of the lower court therefore fully protected the rights of the Land Company as to its power development, and this Court should not impose an additional obligation upon the railroad not contemplated in the agreement with the Development Company and not imposed by law, and now for the first time asserted by the Land Company.

Respectfully submitted,

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